# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

EVERGLADES COLLEGE, INC., d/b/a KEISER UNIVERSITY and EVERGLADES UNIVERSITY

and

Case 12-CA-096026

LISA K. FIKKI, An individual

# ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

#### Submitted by:

John F. King, Counsel for the Acting General Counsel National Labor Relations Board, Region 12 Miami Resident Office 51 SW 1<sup>st</sup> Avenue, Suite 1320 Miami, Florida 33130 Telephone No. (305) 536-4074 Facsimile No. (305) 536-5320 John.king@nlrb.gov

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#### I. Statement of the Case<sup>1</sup>

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations

Board, the undersigned Counsel for the Acting General Counsel files the following Answering

Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge.

This case involves alleged violations of Section 8(a)(1) of the National Labor Relations

Act (the Act) by Everglades College, Inc., d/b/a Keiser University and Everglades University
(Respondent). Specifically, the Complaint alleges that Respondent violated Section 8(a)(1) of
the Act by maintaining and requiring its employees to sign an Employee Arbitration Agreement
that would lead employees to believe that they are barred or restricted from filing charges with
the Board and that requires employees to waive their right to maintain class or collective
actions. (GCX 1(g); ALJD p. 1) The Complaint further alleges that Respondent violated Section
8(a)(1) of the Act by discharging Charging Party Lisa K. Fikki for refusing to sign the Employee
Arbitration Agreement. On August 14, 2013, Administrative Law Judge Melissa M. Olivero
(ALJ) issued her decision in which she found that Respondent had violated the Act as alleged.
The ALJ recommended that the Board order the Respondent to cease and desist from
maintaining, implementing or enforcing the unlawful agreement and discharging or otherwise
discriminating against any employees for refusing to sign any such unlawful agreements. Ms.
Fikki was ordered reinstated with full backpay. On September 11, 2013, Respondent filed its
Exceptions to the ALJD and a Supporting Brief.

#### II. Background

Respondent operates a not-for-profit university with a number of campuses throughout the State of Florida. [GCX 1(g); GCX 14; ALJD p. 2, In. 8] On about June 15, 2012,<sup>2</sup>

The following references are used in this document:

[ALJD p. \_\_\_\_, In. \_\_] = ALJD page and line numbers

[T \_\_\_] = transcript page number.

[GCX \_\_\_] = General Counsel's exhibit number

[RX \_\_] = Respondent's exhibit number

<sup>&</sup>lt;sup>2</sup> All dates are in 2012, unless otherwise specified.

Respondent announced through email communication to its employees that as a condition of employment, the employees would be required to sign electronically a newly-created onboarding package.<sup>3</sup> (GCX 2; GCX 16; ALJD p. 4, ln. 2-4) This package contained 13 documents to be signed electronically. (GCX 16; ALJD p. 2, ln. 30-34) Respondent's Associate Vice Chancellor of Human Resources, Johanna Arnett, testified that since 2009, Respondent had been requiring new employees to complete an earlier online version of the onboarding package, and starting on June 15, Respondent sought to have all employees, including those who had previously executed paper onboarding documents, sign an electronic version of the new package of onboarding documents. (T 107; ALJD p. 2, ln. 37-42; ALJD p. 4, ln. 2-5)

The June 15<sup>th</sup> email included a link for employees to access the onboarding documents, and instructed employees to complete the process by Friday, June 22. (GCX 2; T 25; ALJD p. 2, In. 41-42; ALJD p. 4, In. 5) Respondent required the employees to sign the documents electronically. It is undisputed that in order to access each document, an employee had to electronically sign the previous document in the sequence before being allowed to continue, and that employees were required to electronically sign the entire package of documents. (T 57-58, 121-122; ALJD p. 3, In. 30-34)

After receiving the email, employee Lisa Fikki, a graduate admissions counselor, found that she was unable to access the documents through the links provided. (T 22, 26; ALJD p. 4, ln. 5-6) On June 18, Fikki sent an email to Arnett and Associate Vice Chancellor of Human Resources William Searle, advising them that she was having difficulty accessing the documents through the links provided in Arnett's June 15 email. (GCX 3; T 26) Fikki was able to review the documents on June 20 or 21, but was unable to access them through the links provided by Respondent, and thus was unable to place her electronic signature on them in the manner Respondent required. (T 27-28)

<sup>&</sup>lt;sup>3</sup> The onboarding package is interchangeably referred to as the re-boarding package.

One of the documents Respondent required employees to electronically sign as part of the onboarding package was the Employee Arbitration Agreement that included the following language:

- 5. <u>No Waiver or Release.</u> ....Employee agrees that the termination of Employee's employment by Employer .... for any reason whatsoever, whether with or without cause, shall not release Employee from any of Employee's obligations contained herein.
- 6. Arbitration of Claims. Any controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment and this Agreement, including, but not limited to, claims or actions brought pursuant to federal, state or local laws regarding payment of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration in Fort Lauderdale, Florida, in accordance with the Employment Law Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the above, Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public. Filing and arbitrator fees shall be in accordance with the arbitration rules and any applicable laws. The arbitrator shall have the authority to apportion the filing fee and costs of arbitration with the presumption that the prevailing party shall be entitled to recover all legitimate costs. Unless provided by statute to the contrary, each party shall bear its/his/her own attorneys' fees.

. . . . .

8. <u>Severability, Survivability and Savings.</u> The provisions of this Agreement shall survive the termination of Employee's employment with Employer, regardless of whether such termination is with or without cause, whether by Employer or the Employee, and whether or not Employee asserts that Employer has violated Employee's legal rights in any regard.

. . . . .

11. <u>Independent Legal Counsel</u>. Each party hereby acknowledges that said party has had ample opportunity to seek independent legal counsel, and has been represented by, or has otherwise waived its right to be represented by, such independent legal counsel, with respect to the negotiation and execution of this Agreement.

Emphasis supplied.<sup>4</sup> [GCX 4; GCX 16; GCX 1(g), paragraph 4(a); GCX 1(i)]

It is undisputed that Respondent did not send its employees any documents that explained the meaning of the Employee Arbitration Agreement. (T 169-170)

On June 20, Associate Director of Admissions for the Graduate School Donald DeSormoux told employees that they needed to complete the onboarding documents. (T 31) On the same date, Fikki's supervisor, Associate Director of Admission for the Graduate School Dan Riehle, told her that she needed to make sure that her onboarding documents were completed.<sup>5</sup> (T 31-32)

After receiving a functional link to access the electronic documents, Fikki sent Associate Vice Chancellor of Human Resources Arnett an email on June 21, requesting permission to print the documents and to take them outside of work to review and to receive advice if necessary. (GCX 5). Arnett responded by email that day, granting Fikki permission to print the forms for review, and reminding her of the deadline, which was the following day. In the same email, Arnett advised Fikki to let her know if she needed more time. (GCX 5; T 32)

On June 26, Riehle again asked Fikki to complete the onboarding documents. (T 33) Fikki told Riehle that she was still reviewing them. (T 33) Shortly thereafter, Vice President of the Graduate School Dom Montalvo sent an email to Fikki and two other employees, Manuel Christiansen and Nikki Sawyer, reminding them to complete the onboarding process. (GCX 6; T 33) Later that evening, Fikki sent Montalvo and Arnett an email advising them that she had received the documents on the afternoon of Thursday, June 21, and she had not been able to review them thoroughly or seek advice. In that email, Fikki requested additional time, and

<sup>&</sup>lt;sup>4</sup> Lisa Fikki had signed a "Confidentiality, Non-Solicitation and Arbitration Agreement" in 2010. (GCX 13). However, unlike the June 2012 "Employee Arbitration Agreement," the document Fikki signed in 2010 did not contain a specific waiver of employee rights to bring claims or actions related to employment pursuant to federal, state or local laws, nor did it contain any waiver of the right to arbitrate a claim as a "class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public." In 2012, Respondent replaced the 2010 document with two documents, the Employee Arbitration Agreement and the Employee Confidentiality and Non-Solicitation Agreement. The validity of the 2010 document is not at issue in this case, and the fact that Fikki signed that document is irrelevant to the issues in this case.

<sup>&</sup>lt;sup>5</sup> Neither DeSormoux nor Riehle testified.

referenced Arnett's above-described email, in which Arnett advised Fikki to let her know if Fikki needed additional time. (GCX 5; GCX 7; T 34) The following day, June 27, Montalvo responded to Fikki's email and asked her to provide a date by which she anticipated she would have the documents completed. [GCX 7(a); T 35]

Also, on June 27, at about 11:33 a.m., Fikki received a Microsoft Outlook meeting notification for "Unsigned Employees," which Fikki understood to mean those employees who had not yet signed the onboarding documents. (GCX 8; T 36) The notification was also sent to a number of other individuals, including at least seven whom Fikki identified as admissions counselors. (T 36-38) The notification stated that there was a mandatory meeting at 2:00 p.m. that day in the conference room of Respondent's Associate Vice Chancellor of Online Education, Sherri Olsen.

At 1:32 p.m. on June 27, Fikki sent an email to Respondent officials Arnett, Olsen and Montalvo, in which she asked if she was required to sign the onboarding documents as they were written, or whether the terms of the documents were negotiable. (ALJD p. 4, In. 11-13) She also asked if the documents were a condition of continuing employment. (ALJD p. 4, In. 14-15) Fikki also wrote that she wanted "ample time" to understand and seek advice regarding these documents, that she had just received the documents on the afternoon of June 21 and was trying to review them, but they were more complex than she anticipated and she was in the process of "arranging advisement." (GCX 9) A few minutes later, at 1:40 p.m. on June 27, Olsen responded by email to Fikki stating that her questions would be answered at the scheduled 2:00 p.m. meeting. (GCX 9) Notwithstanding Fikki's inquiry as to whether the terms of the documents were negotiable, Arnett admits that she never responded to Fikki that the

<sup>&</sup>lt;sup>6</sup> Fikki's request appears to have relied upon the above-quoted Independent Legal Counsel paragraph in the Employee Arbitration Agreement stating that each party (including the employee) has had "ample" opportunity to seek and be represented by independent legal counsel "with respect to the negotiation and execution of this Agreement." (GCX 4; GCX 16)

"door was open for her to change the documents," i.e. that the terms of the Employee Arbitration

Agreement or other documents in the onboarding package were negotiable. (T 134)

Fikki attended the meeting in Olsen's office at 2:00 p.m. on June 27. (T 43) Respondent's representatives at the meeting included Arnett, Montalvo, and Olsen. Employees Manuel Christiansen, Nikki Sawyer, Kalliope Vitakis, and John Lepp were present along with several other employees, totaling about a dozen. (T 43-44; ALJD p. 4, In. 9-11) Olsen began the meeting and advised employees that they needed to complete the onboarding documents electronically. (T 45) Olsen explained that this was a long-term project that they had been trying to do for some time and that Dr. Keiser would be available later in the day to answer questions. (T 45) Arnett made similar comments. (T 46) Fikki asked Arnett if the execution of the documents was a condition of continued employment, and Arnett responded that it was. (T 46; ALJD p. 4, In. 14-15) Fikki asked Arnett if she would have ample time to seek legal counsel to get the advice that she needed regarding the documents, including the Employee Arbitration Agreement. (T 46-47; ALJD p. 4, In. 16-17) Arnett replied that Respondent already had an (earlier version of an) arbitration agreement on file for many of the employees.7 (T 47; GCX 13) Fikki asked to see hers, and again asked if she would have ample time to review the documents. (T 47) Arnett responded that they had until 2:00 p.m. on Friday (June 29) to complete the onboarding process. (T 47) Montalvo then spoke. He told the employees that the documents were normal business procedure, that Dr. Keiser was trying to complete the onboarding program, and that the documents were simple and would only take five minutes to complete. (T 47) Fikki told Montalvo that the documents might be simple to him, but that she would like to know what she is signing and she would like the opportunity to review them and to get advice. (T 47) Montalvo advised the group that if anyone needed to get advice, then they should take a day off to do so. (T 47-48)

<sup>&</sup>lt;sup>7</sup> Arnett was apparently referring to the "Employee Confidentiality, Non-Solicitation and Arbitration Agreement that Fikki signed in 2010. (GCX 13). See footnote 4, supra.

Later on June 27, at around 4:00 p.m., Fikki attended a meeting with the University Chancellor and CEO, Dr. Keiser, in his conference office, (T 48) Associate Vice Chancellors Arnett and Searle, and employees Christiansen and Vitakis were also present. (T 48, ALJD p. 4. In. 19-20) Arnett advised Dr. Keiser that some of the employees had guestions about the onboarding project and that there were difficulties with accessing the documents. (T 48) Vitakis advised Keiser that she had just obtained the documents that day and had not been able to review them. (T 49) Fikki told Keiser that she had received the documents and was putting them in order and wanted to obtain legal advice. (T 49) Keiser told the group that he felt that they had enough time to review the documents. (T 49) Vitakis asked if she could have time to address the Employee Arbitration Agreement with her attorney, and Fikki stated that she would also like to be able to seek legal advice. (T 49) Keiser, in an apparent attempt to downplay the complexity of the Employee Arbitration Agreement, advised the employees that arbitration creates a level playing field, where someone he doesn't know comes in to make the determination. (T 49-50; ALJD p. 4, In. 20-21) He also stated that he does not like to enter into costly litigation and that he was planning on settling a pending lawsuit. (T 50) Keiser asked Fikki what her beef was. (T 50; ALJD p. 4, In. 21-22) Fikki responded that she wanted to be able to seek legal advice regarding the documents because they were in legalese and difficult to understand. (T 50; ALJD p. 4, In. 22)

Fikki's primary concerns with the onboarding documents were with the Employee Arbitration Agreement, because it had language waiving certain of her rights as an employee, and with the Employee Confidentiality and Non-Solicitation Agreement.<sup>8</sup> (T 72-73; GCX 16) Fikki requested that she be allowed to seek legal advice without being terminated by the deadline of 2:00 p.m. Friday (June 29). (T 50-51; ALJD p. 4, In. 23) Keiser told the

<sup>&</sup>lt;sup>8</sup> The only two documents in the onboarding package that had a provision stating that the employee had the opportunity to seek and be represented by independent legal counsel were the Employee Arbitration Agreement and the Employee Confidentiality and Non-Solicitation Agreement.

employees that they would have additional time if they provided a letter of appointment from an attorney by the June 29<sup>th</sup>, 2:00 p.m. deadline. (T 51; ALJD p. 4, In. 24-25)

Arnett testified on cross-examination, albeit not in response to the question she was asked, that Keiser told the employees to let management know when their attorney was willing to meet with them, and he wanted to make sure it was within a reasonable amount of time. (T 124-124) Arnett conceded that Keiser did not say anything about a new deadline for electronically signing the onboarding package. (T 125-126)

It is undisputed and clear from her exchanges with Arnett and Keiser at these meetings that Fikki specifically requested an opportunity to consult counsel with respect to the content of the Employee Arbitration Agreement.

On the morning of June 29, Fikki obtained an appointment email from Attorney Adi Amit. According to Amit's email, due to his schedule, the earliest he would be available to meet with her was at 10:30 a.m. on July 18. (GCX 10; T 52; ALJD p. 4, In. 25-27) Fikki forwarded the letter to Arnett on June 29, at 11:56 a.m., prior to the 2:00 p.m. deadline. (GCX 10; T 52; ALJD p. 4, In. 25-27) Sometime after 2:00 p.m. on June 29, Fikki received an email from Arnett at her work email address. (GCX 12) Arnett's email stated that the deadline for the completion of the onboarding documents was extended to 6:00 p.m. on July 10. At 7:43 p.m. on June 29, Arnett sent a message to Fikki's personal email advising her of the July 10 deadline. (GCX 11; T 54; ALJD p. 4, In. 29-30) Thus, Respondent implemented the July 10 deadline after Fikki complied with Keiser's request that she provide an attorney appointment letter, and notwithstanding its possession of the letter to Fikki from her chosen attorney, Adi Amit, that the earliest he could meet with her was on July 18.9 Respondent took this action even though, as Associate Vice

<sup>&</sup>lt;sup>9</sup> Fikki's attorney was involved in pending litigation against Respondent. (T 158, 161)

Chancellor Searle conceded, there was nothing pressing that required Respondent to have the onboarding process completed before July 19.<sup>10</sup> (T 145)

Fikki worked on July 10 without incident. (T 55; ALJD p. 4, ln. 36) On July 12, Fikki arrived at work around 11:00 a.m. (T 55) She was unable to log into her work station. (T 55; ALJD p. 4, ln. 37) One of her coworkers told Fikki that Dom Montalvo, Vice President of the Graduate School, had been at her desk a few minutes earlier. (T 55) Shortly thereafter, Montalvo came to Fikki's workstation and asked her to accompany him to the Human Resources office. (T 55; ALJD 4, ln 37-38) Fikki and Montalvo went to Associate Vice Chancellor of Human Resources Searle's office. Searle and Arnett were present. Searle told Fikki that effective immediately, she was being discharged for failure to sign the electronic onboarding documents. (T 56, 141; ALJD p. 4, ln. 38-40) Fikki responded that she had an agreement with Dr. Keiser, and that she had provided the attorney appointment letter as instructed. (T 56; ALJD p. 4, ln. 40-41) Arnett interrupted and told Fikki that she had plenty of time to talk to anyone. (T 56; ALJD p. 4, ln. 41) Montalvo then escorted Fikki from the property. (ALJD p. 4, ln. 42)

As noted above, it is undisputed that in order to access each document in the onboarding package, employees had to place their electronic signature on the previous document before being allowed to continue. (T 57-58, 121-122) In other words, Fikki was not able to execute the other documents and save the Employee Arbitration Agreement for further consideration or "negotiation."

<sup>&</sup>lt;sup>10</sup> Searle essentially made the same admission in response to a December 2012 email question from Jane Robertson of Oasis Outsourcing, Respondent's unemployment insurance hearing representative with respect to the unemployment insurance claim of Lisa Fikki. Robertson asked why Respondent chose the July 10 deadline after receiving the letter from Fikki's attorney (stating he could not meet with her until July 18). Searle replied that "Dr. Keiser had provided an extension until the 10<sup>th</sup> and if you need to have an attorney review it - you have until the 10<sup>th</sup> (basically, it is not our concern that your attorney is busy and there are hundreds of other attorney's (sic) out there)." (GCX 15). In any event, it does not matter whether or not Respondent provided Fikki a reasonable amount of time to consult an attorney, because the Employee Arbitration Agreement is unlawful on its face and the discharge of Fikki because she did not sign that unlawful document is also unlawful.

It is undisputed that Respondent required all of its employees, around 3400 individuals, at all of its locations to complete the onboarding/reboarding documents by no later than July 10, 2012 or be subject to termination. (T 109-110, 123; GCX 14, paragraphs 3 and 6) Arnett testified that all but two employees completed the onboarding documents. (T 110)

As noted above, the ALJ, based on the testimony and record evidence, found that Respondent violated Section 8(a)(1) of the Act by requiring employees to sign an Employee Arbitration Agreement which 1) would lead employees to believe that they are barred or restricted from filing charges with the Board and 2) requires employees to waive their right to maintain class or collective actions. The ALJ further concluded that the Respondent violated Section 8(a)(1) by discharging Lisa Fikki for failing to execute the unlawful agreement.

#### III. Response to Respondent's Exceptions

A. Respondent's Exceptions to the ALJ's Findings of Fact are without Merit.

(Exception 1)

Respondent excepts to the ALJ's characterization of the facts related to the June 27<sup>th</sup> mandatory meeting, as set forth on page 4 of her decision. Specifically, Respondent excepts to the ALJ's finding that Arnett told Fikki that she would have ample time to seek legal counsel, as those words were not specifically uttered by Arnett on the stand. Respondent's contention has some facial validity, however, the ALJ made it clear in footnote 3 that, while she included citations to the record, her findings and conclusions are not based solely on those specific record citations, but rather on her review and consideration of the entire record of the case. The ALJ clearly recognized that Arnett did not utter the *specific* words noted above; for in her decision, she succinctly states in footnote 9 "The phrase 'ample times' appears in sec. 11 of the Employee Arbitration Agreement, supra." This footnote, in conjunction with her footnote 3, validates the ALJ's finding that Respondent communicated to Fikki that she would have ample time to seek legal counsel.

At any rate, Counsel for the Acting General Counsel submits that this testimony is immaterial to the issues at hand. Regardless of whether Respondent, through Arnett, told Fikki that she would have ample time to seek legal counsel, the fact remains that Respondent required employees to sign an unlawful Employee Arbitration Agreement, and subsequently discharged Fikki when she failed to do so. Accordingly, Respondent's Exception 1 should be denied.

#### B. Respondent's Exceptions to the ALJ's Discussion and Analysis

1. Respondent's Employee Arbitration Agreement Interferes with Employee Rights to File and Pursue Charges under the Act with the Board, in Violation of Section 8(a)(1) of the Act. (Exceptions 2-6)

In its exceptions 2 through 6, Respondent excepts to the ALJ's finding that the Employee Arbitration Agreement contains broad language that applies to all causes of action under federal, state, and local laws and that the language used therein would reasonably lead employees to believe that claims under the NLRA would be included in the arbitration requirement. (Exception 2; ALJD p. 5, In. 34-36) Respondent further excepts to the ALJ's finding that the language "except where specifically prohibited by law" as found in the Employee Arbitration Agreement does not cause her to reach a different conclusion than that in *D.R. Horton*, 357 NLRB No. 184 (2012), even though no such language appeared in the *Horton* agreement, as that phrase is ambiguous and employees cannot be expected to possess a working knowledge of federal laws and statutes which specifically prohibit mandatory arbitration of claims. (Exception 3, 5, 6; ALJD p. 5, In. 44-47, p. 6, In. 1-2).

Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of mutual aid and protection. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court held that the mutual aid and protection clause of the Act protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums. The Board and courts have consistently held that the filing

of collective complaints and lawsuits regarding working conditions constitutes protected concerted activity. *Novotel New York*, 321 NLRB 624, 633 (1996); *Mohave Elec. Coop., v. NLRB*, 206 F. 3d 1183, 1188-89 (D.C. Cir. 2000). See also *U Ocean Palace Pavilion*, 345 NLRB 1162, 1170, (2005); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975), enfd. mem. 567 F. 2d 391 (7<sup>th</sup> Cir. 1977), cert. denied 438 U.S. 914 (1978) (contrary decision by arbitrator deemed repugnant to the purposes of the Act). More recently, in *D. R. Horton*, the Board held that the right to engage in collective actions with respect to one's terms and conditions of employment is a cornerstone principle of Section 7, whether the action arises in the context of a collective bargaining agreement, or a unilaterally imposed employment arbitration agreement. In doing so, the Board cited its 1976 holding in *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1033 as follows:

It is equally well settled that the advancement of a collective grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure. *N.L.R.B. v. Washington Aluminum Company, Incorporated*, 370 U.S. 9 (1962); *N.L.R.B. v. Walls Manufacturing Company*, 321 F.2d 753 (C.A.D.C., 1963); *N.L.R.B. v. Hoover Design Corporation*, 402 F.2d 987 (6<sup>th</sup> Cir. 1968).

The Board further held in D.R. Horton, 357 NLRB No. 184, slip op. at p.3:

To be protected by Section 7, activity must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), affd. sub nom., *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

In *D.R. Horton*, the Board further found that class or collective legal actions, regardless of the forum, constitute concerted activities that are protected by Section 7 of the Act, and are central to the core purposes of the Act. *D.R. Horton*, slip op. at p.3. Like the Mandatory Arbitration Agreement in *D.R. Horton*, Respondent's Employee Arbitration Agreement clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA. *Id.* at p.4. In addition, the undisputed facts show that

Respondent required its employees to sign the Employee Arbitration Agreement as a condition of continued employment.

Respondent's Employee Arbitration Agreement requires the arbitration of any claims "arising out of or relating to" employment or separation from employment, including claims or actions brought pursuant to federal, state or local laws regarding payment of wages, tort, discrimination, harassment and retaliation" "except where specifically prohibited by law," and further provides that employees waive any right to arbitrate such employment-related claims as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public."

In evaluating whether an employer has violated Section 8(a)(1) by maintaining a mandatory arbitration policy, the Board applies the test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) which was set forth in *Lafayette Park Hotel*, 326 NLRB 824-825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). *D.R. Horton*, 357 NLRB No. 184, slip op. at p.4; *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007) (finding policy unlawful because employees would reasonably read it to require resort to arbitration and preclude filing of Board charges). Under *Lutheran Heritage Village*, the Board first determines whether the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If the rule does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. 343 NLRB at 646–647.

The Acting General Counsel submits that, like the Mandatory Arbitration Agreement in *D.R. Horton*, Respondent's Employee Arbitration Agreement "expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA." *D.R. Horton*, supra at p.4. In finding the mandatory arbitration agreement in *D.R. Horton* unlawful, the Board relied on the Supreme Court decisions in *National Licorice Co. v. NLRB*,

309 U.S. 350, 360 (1940) (individual employment contracts that discourage or forbid an employee from presenting his grievance to the employer through a union, or any way except personally, are unlawful and unenforceable) and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (individual contracts may not be availed of to defeat or delay the procedures prescribed by the Act; wherever private contracts conflict with the Board's functions, they must yield or the Act would be reduced to a futility). The Board also relied on its decision in *J.H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part, 125 F.2d 752 (7<sup>th</sup> Cir. 1942) (individual employment contract requiring employee to attempt to resolve dispute individually with the employer and then go to individual arbitration), and the Norris-LaGuardia Act's prohibition against yellow dog contracts pursuant to which employees are required to cede their statutory rights under the Act. *D.R. Horton*, supra at p.4-5. Those authorities equally support the finding that Respondent's Employee Arbitration Agreement is facially invalid.

The ALJ correctly found that the broad language contained in Respondent's Employee Arbitration Agreement would reasonably be read by employees to prohibit filing of unfair labor practices charges with the Board. (ALJD p. 5, ln. 34-41) Respondent argues in its brief that the ALJ had to refrain from reading the arbitration agreement as prohibiting protected activity just because the agreement could possibly be interpreted that way. Respondent relies on the Board's holding in *Lutheran Heritage* to support its position. Respondent's argument, however, is misguided. In *Lutheran Heritage*, the ALJ, affirmed by the Board, found that three of the Employer's work rules were unlawful and three were not unlawful. *Lutheran Heritage* at 646. In analyzing the rules under the framework as set forth in *Lafayette Park*, the *Lutheran Heritage* Board agreed with the ALJ that the rules regarding solicitation, loitering, striking/work stoppages all infringed upon the employees Section 7 rights. *Id*.

In Lutheran Heritage the Board, affirming the ALJ, also held that the Employer's policies regarding abusive language and harassment were not unlawful. The Board noted that the Employer has a legitimate interest in maintaining a safe work environment as they have an

affirmative duty to maintain a workplace free of racial, sexual and other harassment. *Lutheran Heritage* at 647. The Board held that rules regarding verbal abuse and profane language do not expressly cover Section 7 activity, nor are verbal abuse and profane language an inherent part of Section 7 activities. Id. The Board further concluded that a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act. Id. citing *Adtranz ABB Daimler-Benz Transp., N.A. Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001). It was in this context of a rule concerning subject matter that does not directly relate to employees' Section 7 rights that the Board held that it would not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. *Lutheran Heritage* at 647. Emphasis in original. The Board went on to say "to take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, *even though that reading is unreasonable*. Id. Emphasis added.

In the instant matter, the ALJ did not conclude that a reasonable employee would conclude that the Employee Arbitration Agreement applied to Section 7 activity, simply because it *could* be interpreted that way. Rather, the ALJ determined that the Employee Arbitration Agreement would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. (ALJD p. 5, In. 34-36). Respondent's characterization of the ALJ's holding as applied to the analytical framework of *Lutheran* and *Lafayette Park* is incorrect.

Respondent argues that the ALJ disregarded evidence that employees have filed charges with governmental agencies despite having signed the arbitration agreement.

Respondent's contention that because Fikki herself filed a charge, the agreement could not reasonably be interpreted as prohibiting the filing of Board charge, is meritless. The filing of a charge in contravention of an express or implied prohibition against doing so in no way compels the conclusion that a reasonable employee would not interpret the prohibition as applying to the filing of that charge. The Board has held in various contexts that the standard for determining

whether conduct violates Section 8(a)(1) of the Act is an objective one, based on whether the statement or policy has a reasonable tendency to coerce or interfere with the exercise of employee rights under the Act, and that an employee's subjective feelings about the employer's conduct are not relevant. *KAG-West*, *LLC*, 358 NLRB No. 161, slip op. at p.6 (2012); *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004). Thus, the ALJ's findings are consistent with extant case law and Board precedent as well as contemporary jurisprudence under which evidence of individual conduct is not considered when evaluating whether a position or interpretation is reasonable.

In its argument in support of Exception 4, Respondent claims that the Employee

Arbitration Agreement does not specifically mention the Act, and that the ALJ's decision

essentially concludes that Respondent is requiring employees to waive their Section 7 rights.

However, Respondent's Employee Arbitration Agreement specifically states:

Any controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment and this Agreement, including, but not limited to, claims or actions brought pursuant to federal.... laws regarding payment of wages, ... discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration.

The Act is a federal law and is therefore clearly covered by the Employee Arbitration Agreement. The type of disputes described regarding separation from employment, payment of wages, discrimination, harassment and retaliation are also clearly subject matter of cases brought before the Board pursuant to the Act. Thus, a reasonable employee likely would conclude that the Employee Arbitration Agreement requires that such disputes be arbitrated and that access to the Board is foreclosed. Moreover, Respondent's employees are not attorneys and should not be expected to figure out what is "specifically prohibited by law." A reasonable employee is unlikely to retain an attorney to figure out whether he or she may file a charge with the Board, a federal agency, pursuant to the Act, and rather is likely simply seek arbitration. Nor should an employee be required to retain an attorney to figure out if he or she has a right to file

a charge with the Board, as the cost of retaining counsel may itself impede an employee's access to the Board.

Respondent cites *Dorsey Trailers, Inc.* 327 NLRB 835 (1999) in support of its argument that the ALJ improperly concluded that the Employee Arbitration Agreement constitutes a de facto waiver of an employee's Section 7 rights, because waivers of rights must be clear and unmistakable, and there is not a clear and unmistakable waiver in the Employee Arbitration Agreement. Once again, Respondent's argument and case law in support of its exception are inapplicable.

First, there is a stark difference between the waiver of rights in a collective bargaining context and a waiver of rights in the context of an Employee Arbitration Agreement. Collective bargaining involves two or more parties with relatively equal bargaining power negotiating to reach a contract covering a group of employees. Proposals and counterproposals are submitted by both sides, offers are made, accepted and rejected. In that context, the Board has concluded that a waiver must be clear and unmistakable. However, no such back and forth exists in the context of an Employee Arbitration Agreement. Employees are presented with the agreement and are forced to execute it, regardless of whether they agree with its terms, lest they are discharged from their employment. It would be inappropriate to use the "clear and unmistakable" waiver doctrine as applied in the collective bargaining context in analyzing the Employee Arbitration Agreement, as the two are not analogous situations.

Second, a waiver finding is not required here. Rather, the question is whether the Employee Arbitration Agreement interferes with, restrains or coerces employees in the exercise of their rights under the Act, in violation of Section 8(a)(1) of the Act. The terms of the Employee Arbitration Agreement gives reasonable employees the understanding that the only avenue they have to challenge Employer conduct related to the employment, when such conduct is claimed to violate federal law such as the Act, is arbitration, rather than the filing and pursuit of charges with the Board. Accordingly, by requiring employees to sign its Employee

Arbitration Agreement, Respondent has interfered with its employees' Section 7 rights, and violated Section 8(a)(1). For these reasons, Exception 4 is without merit.

In Exception 5, Respondent argues that the ALJ's reliance on *U-Haul Co. of California*, and D.R. Horton is inappropriate, as the language in the Employee Arbitration Agreement is not remotely similar to the language that the Board found unlawful in those cases. Respondent notes that the language in *U-Haul* included a list of examples of the types of disputes or claims covered by the arbitration agreement, with specific reference to any other legal or equitable claims and causes of actions recognized by federal law or regulation. Although the wording in Respondent's Employee Arbitration Agreement is not precisely the same as the language of the mandatory arbitration agreement in *U-Haul*, In *U-Haul*, the Employer argued that its list did not include the NLRA, and thus, it could not reasonably be concluded that its prohibitions included the filing of NLRB charges. The Board rejected this argument. In the instant matter, it can be argued that Respondent's Employee Arbitration Agreement makes an even stronger case for an 8(a)(1) violation than the *U-Haul* case, as Respondent's Employee Arbitration Agreement appears to apply to all claims arising out of employment. As noted above, the deeply buried exception language "except where specifically prohibited by law" does not negate the finding that an employee could reasonably conclude that the agreement prohibited the filing of an unfair labor practice charge.

Respondent also points out in Exception 5 that its Employee Arbitration Agreement contains language that is different than the language in *D.R. Horton*. Nowhere in *U-Haul* or *D.R. Horton* does the Board suggest that in order to find a violation, the exact language must exist in the agreement that is being analyzed. There are indeed a myriad of word choices that an employer might use that could reasonably be interpreted as interfering with the exercise of Section 7 rights. Nothing in *D.R. Horton* or *U-Haul* suggests that the specific language in the mandatory arbitration agreements in those cases is required to conclude that the agreement is unlawful. Accordingly, Respondent's Exception 5 is without merit and should be denied.

In its Exception 6, Respondent argues that the ALJ's decision is in contravention of the Federal Arbitration Act. A similar claim was made in *D. R. Horton* and was rejected by the Board. For the reasons explained by the Board in *D.R. Horton*, a finding that Respondent's Employee Arbitration Agreement violates Section 8(a)(1) of the Act does not conflict with the Federal Arbitration Act or undermine the policy underlying the FAA. D.R. Horton slip op. at p.7-

Respondent also argues that the arbitration agreement should not be found unlawful unless Respondent attempts to enforce it upon filing of administrative charges. Respondent's argument, however, puts the cart before the horse. A reasonable employee would read the Employee Arbitration Agreement as a prohibition against the filing of charges with the Board, and therefore it is likely that Respondent will have little need to enforce the agreement. This is because aggrieved employees would most likely seek to have their Section 7 disputes arbitrated in the Employer's arbitral forum, and would not even attempt to file a charge with the Board. Accordingly, based on the above, Respondent's mandatory arbitration agreement interferes with access to the Board, in violation of Section 8(a)(1) of the Act, and Exceptions 2-6 are without merit and should be denied.

2. Respondent's Employee Arbitration Agreement Prohibits Class or Collective Action, in Violation of Section 8(a)(1) of the Act. (Exceptions 7 and 8)

Respondent excepts to the ALJ's finding that the Employee Arbitration Agreement prohibits class or collective actions. Respondent argues that the ALJ disregarded federal court precedent. It is well-settled that the Board is not bound by court precedent other than that of the United States Supreme Court. Respondent cites *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) in its brief as one of the cases that the ALJ apparently overlooked. In its decision in *D.R. Horton*, the Board expressly addressed the applicability of *Gilmer* in the context of arbitration disputes as they relate to employee arbitration agreements. In relevant part, the Board noted that *Gilmer* did not address Section 7 nor the validity of a class action waiver;

rather the claim in *Gilmer* was an individual one and the arbitration agreement did not contain language specifically waiving rights to class or collective claims. D.R. *Horton*, slip op. at p. 9. For the reasons set forth in the *D.R. Horton* decision, the ALJ's decision does not contravene the Supreme Court's holding in *Gilmer*.

Respondent also cites *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) in support of its claim that nothing in the Act expressly precludes a class or collective action waiver in an arbitration agreement and that such agreements are legal and enforceable. Once again, Respondent is misguided. The *American Express* case involves a group of merchants, not individual employees. Section 7 rights, which include the right to engage in collective activities, were not an issue in that case. Accordingly, the Supreme Court's holding in that case is irrelevant and inapplicable to the facts in the instant case.

Respondent also argues that the ALJ's decision is in contravention of the Federal Arbitration Act. However for the reasons set forth above, as well as those reasons described in the Board's holding in *D.R. Horton*, the Acting General Counsel asserts that the ALJ's decision in no way contravenes the FAA. Based on the above, Respondent's Employee Arbitration Act interferes with employee rights to engage in protected concerted activities, in violation of Section 8(a)(1) of the Act, and Respondent's Exceptions 7 and 8 are without merit and should be rejected.

3. Respondent Discharged Lisa Fikki because she did not Sign its Employee

Arbitration Agreement, in Violation of Section 8(a)(1) of the Act. (Exceptions 9-16)

Respondent argues that the ALJ erred in finding that it violated Section 8(a)(1) of the Act by discharging Lisa Fikki. Respondent argues that it could not have violated the Act by discharging Fikki because, for the reasons described above, the Employee Arbitration Agreement was not unlawful. For the reasons found by the ALJ, and for the reasons discussed above, Respondent's contention that its Employee Arbitration Agreement is lawful should be rejected.

Respondent further argues that Fikki was not discharged because she refused to sign the agreement, but was discharged because she failed to comply with Respondent's requirement that she sign the agreement, or "re-board," by an established deadline. As noted above, it is undisputed that the re-boarding documents included the Employee Arbitration Agreement. (ALJD p. 2, ln. 33-34; ALJD p. 3, ln. 30-31) It is also undisputed that in order to complete the process, Fikki had to execute all re-boarding documents (ALJD p. 2, ln. 37-41) It is further undisputed that completing the documents was a condition of continuing employment. (ALJD p. 3, ln. 30-31) The re-boarding documents contained the unlawful Employee Arbitration Agreement, and the only way that Fikki could have continued her employment was by signing the unlawful agreement. She was never given the opportunity to sign all other documents and save the Employee Arbitration Agreement for further consideration or discussion.

Respondent goes on to argue in its exceptions brief that Fikki was given ample time to seek legal advice and that she failed to do so until two weeks after the re-boarding process was announced. Counsel for the Acting General Counsel submits that the length of time Respondent gave Fikki to sign the unlawful Employee Arbitration Agreement is irrelevant. It would not matter had the Respondent given Fikki one minute or one year to sign the documents. At their simplest, the facts are that Fikki was required to sign an unlawful agreement contained among a group of other documents, the documents could only be signed as a package, and she was fired for failing to sign the documents.

Respondent argues that the ALJ's reliance on *Supply Technologies, LLC*, 359 NLRB No. 38 (2012) is misplaced as the facts of that case were very different as they relate to the language contained in the Employee Arbitration Agreement. In fact, Respondent's argument is misplaced. The ALJ did not rely on *Supply Technologies* in evaluating the legality of the Employee Arbitration Agreement. She only relied on *Supply Technologies* after having already found that the Employee Arbitration Agreement was unlawful. In that regard, her reliance on *Supply Technologies* is appropriate and well supported by the facts in the case.

Finally, Respondent excepts to the ALJ's determination that *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982) is inapplicable here. The ALJ was correct in her determination that a *Wright Line* analysis is not appropriate here. (ALJD p. 8, ln. 5-8). In cases involving a *Wright Line* analysis there are ostensibly two or more reasons asserted for the adverse employment action. The question is whether an employee was discharged because of union or protected concerted activities, or for some other reason(s) offered by the employer. In contrast, in the instant matter, there is only one reason for the discharge of Fikki, and the fact that Fikki was discharged because she did not sign the Employee Arbitration Agreement as required is not controvertible. Therefore, a *Wright Line* analysis is inapplicable here.

Based on the above, Respondent violated Section 8(a)(1) of the Act by discharging Lisa Fikki because she did not sign its unlawful Employee Arbitration Agreement. Accordingly, Respondent's exceptions 9-16 are without merit and should be rejected.

#### 4. Conclusions of Law, Remedy and Order. (Exceptions 17-28)

Respondent argues that the ALJ's legal conclusions remedy and recommended order are unsupported by the facts. However, for the reasons set forth above, the Acting General Counsel submits that the ALJ's Decision was well supported by the facts and the law. The ALJ's conclusions of law are consistent with her factual findings and the case law relevant thereto. The ALJ's remedies and recommended order are consistent with Board cases involving similar violations. Accordingly, Exceptions 17-28 are without merit and should be rejected.

#### IV. Conclusion

For the reasons set forth above, Counsel for the Acting General Counsel respectfully urges the Board to deny each and every one of Respondent's exceptions as they are without merit. In addition, the Acting General Counsel respectfully urges the Board to adopt the ALJ's Decision and Recommended Order.

Respectfully submitted,

John F. King

Counsel for the Acting General Counsel National Labor Relations Board, Region 12

Miami Resident Office

51 SW 1<sup>st</sup> Avenue, Suite 1320

Miami, Florida 33130

Telephone No. (305) 536-4074

Facsimile No. (305) 536-5320

John.king@nlrb.gov

#### **CERTIFICATE OF SERVICE**

I hereby certify that the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge in the matter of Everglades College, Inc. d/b/a Keiser University and Everglades University, Case 12-CA-096026 was duly served upon the following individuals by electronic transmittal on September 25, 2013, by the following means:

#### Electronic Filing:

Hon. Gary W. Shinners Executive Secretary National Labor Relations Board 1099 14<sup>th</sup> Street, N.W. Washington, D.C. 20570 www.nlrb.gov

#### **Electronic Mail:**

John M. Hament, Esq. Kunkel, Miller &Hament 235 N. Orange Avenue, Suite 200 Sarasota, FL 34236 john@kmhlaborlaw.com

James W. Waldman, Esq. Keiser University 1900 W. Commercial Boulevard, Suite 180 Fort Lauderdale, FL 33309 jwaldman@keiseruniversity.edu

Lisa K. Fikki 2701 SE Bishop Avenue Port Saint Lucie, FL 34952-7202 lisa@fikki.net

John F. King

Counsel for the Acting General Counsel National Labor Relations Board, Region 12

Miami Resident Office

51 SW 1<sup>st</sup> Avenue, Suite 1320

Miami, Florida 33130

Telephone No. (305) 536-4074 Facsimile No. (305) 536-5320

John.king@nlrb.gov